Supreme Court, U.S.
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No. 94-1797

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

Martin Light; Diane Light; and Lauren Light, a minor by and through Martin and Diane Light, her next friends,

Petitioners,

v.

Parkway C-2 School District; and Special School District of St. Louis County,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF Certiorari**

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Questions Presented for Review

I

Whether the United States Court of Appeals for the Eighth Circuit correctly applied the standard announced by this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in finding that a student who, at various times, has hit, kicked, and slapped other students, thrown pencils and other objects at other students' eyes, ears, and faces, and attempted to overturn desks and tables, is a student who is substantially likely to cause injury either to herself or to others.

II

Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in applying the standard announced in **Honig** in a carefully reasoned opinion.

III

Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

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II. Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in applying the standard announced in **Honig** in a carefully reasoned opinion.

III. Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

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Opinions Below

Respondents accept the Opinions Below as set forth in Petitioners' Petition for Writ of Certiorari.

Jurisdictional Statement

Respondents accept the Jurisdictional Statement as set forth in Petitioners' Petition for Writ of Certiorari.

Constitutional Provisions and Statutes Involved

Respondents accept the Constitutional Provisions and Statutes Involved as set forth in Petitioners' Petition for Writ of Certiorari, as supplemented herein.

20 U.S.C. § 1401(a)(18).

(a) As used in this chapter —

(18) The term "free appropriate public education" means special education and related services that —

(A) have been provided at public expense, under public supervision, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1412(1) and (5)(B).

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * *

(5) The State has established . . . (B) procedures to assure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the

regular educational environment occurs only when the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Statement of the Case

This case involves the application of the decision of the United States Supreme Court in **Honig v. Doe**, 484 U.S. 305 (1988), to a situation involving Lauren Light. At the time of the hearing before the United States District Court for the Eastern District of Missouri, Hon. George F. Gunn, Jr., Lauren was thirteen years old. Lauren is a student with disabilities, for purposes of the Individuals with Disabilities Education Act, (IDEA or the Act) 20 U.S.C. §§ 1400-85. At various times, Lauren has been diagnosed as having a behavior disorder, a conduct disorder, a pervasive developmental disorder, a language impairment, an organic brain syndrome, mild to moderate mental retardation, and certain features of autism. Distilling the various diagnoses, Lauren presents as a child who is prone to impulsive, unpredictable, and aggressive behavior. The behaviors which Lauren demonstrates include kicking, biting, hitting, throwing objects, such as pencils, and overturning furniture.

Respondents take issue with Petitioners' statement that Lauren's condition is less severe than autism. Respondents agree that Lauren does not have all of the markers which would result in a diagnosis of autism. However, Lauren possesses other markers, not necessarily associated with autism. Moreover, autism, itself, suggests varying degrees of disability, ranging from mildly autistic to severely autistic.

Respondents also take issue with Petitioners' position that Lauren does not have a conduct disorder. Petitioners rely on the testimony of Dr. Audrey Hill. Respondents note that Dr. Hill, a resident child psychiatrist at St. Louis University Health Sciences Center at the time of the hearing, had never conducted a complete reevaluation of Lauren, nor had Dr. Hill removed the conduct disorder

diagnosis after treating her. Dr. Hill first announced her questioning of the conduct disorder diagnosis at the hearing before the district court.

Rather than quibble over definitions and labels, however, Respondents will confine themselves to a discussion of behaviors in which Lauren was observed to engage while in the school setting.

As the Eighth Circuit noted in its December 2, 1994, decision, the parents, themselves, describe Lauren as "sometimes defiant, easily frustrated, irritable, impulsive, and easily distracted." **Light v. Parkway C-2 School Dist.**, 41 F.3d 1223, 1225 (8th Cir. 1994)(quoting Plaintiffs' Motion for Temporary Restraining Order at 2). The parents went on to state that Lauren "sometimes exhibits aggressive behaviors such as kicking, biting, hitting and throwing objects." **Id.**

Throughout much of her educational career, Lauren was educated in schools operated by the Special School District of St. Louis County, (SSD), schools devoted to the education of students with multiple disabilities or severe disabilities, with educational programs designed to meet the educational needs of such students. Prior to the beginning of the 1992-93 school year, Lauren's parents expressed a desire that Lauren be educated in a school operated by the Parkway C-2 School District (Parkway). If Lauren were not disabled, she would have attended a Parkway school. An individualized education program (IEP) was written for Lauren, which incorporated a number of accommodations intended to allow Lauren to be educated satisfactorily in a Parkway school, specifically, at Riverbend Elementary School. Lauren spent the 1992-93 school year enrolled in a self-contained classroom, for students with mental disabilities at Riverbend, operated by the SSD.

At the end of the 1992-93 school year, it was decided that Lauren would move up to Parkway Central Middle School for the 1993-94 school year. There, she would be among age-equivalent peers. In order to facilitate a successful stay at Parkway Central Middle School for Lauren, the SSD incorporated a number of accommodations into Lauren's IEP for the 1993-94 school year. Lauren's IEP required that Lauren be accompanied by and taught by a teacher and an aide, specifically assigned to her. As the Eighth Circuit noted: "Thus, in addition to the classroom teacher assigned to her room, Lauren was accompanied by one full-time teacher, Jane Galownia, and one full-time teacher's assistant, Lynn Wilson, throughout the school day. Both Galownia and Wilson have been certified by the State of Missouri to teach students with mental handicaps, behavioral disorders, and learning disabilities." **Id.** In addition, a classroom aide was assigned to the classroom where Lauren received the majority of her education.

That was not all that the SSD and Parkway did for Lauren during the 1993-94 school year:

> [T]he SSD provided special training to members of the staff who regularly came into contact with Lauren, including training in behavior management, inclusion, and crisis intervention. To ease the transition from Riverbend, the SSD agreed to retain the services of a consultant selected by the Lights, Mary Granville of the Judevine Center for Autistic Children. Granville had worked with Lauren at Riverbend to facilitate her inclusion in the regular school environment, and performed a similar role in planning for and assisting with Lauren's transition to Parkway Central Middle School. Lauren's curriculum included speech therapy,

occupational therapy, physical therapy, instruction in daily living skills, adapted physical education, functional academics, and weekly community access opportunities. Lauren's teachers kept daily logs of her activities and behavior and provided daily reports to her parents. Outside of the special education classroom, Lauren was enrolled in several courses in the regular classroom setting with her nondisabled peers, including physical education, art, computer lab, home economics, and library. The SSD provided staff support for Lauren to participate in after-school activities. In September of 1993, the SSD agreed to a request by Lauren's parents that she be provided music therapy twice a week. When Lauren's music therapist became ill, the SSD hired a replacement and increased the frequency of the lessons to three a week to make up for lost instructional time. No other SSD student was provided with music therapy.

Id.

Despite the intensive interventions built into Lauren's IEP, she nevertheless exhibited numerous and frequent aggressive and disruptive behaviors. Many of the aggressive acts resulted in the recipient of the aggression having to see the school nurse. At one point, Lauren bit Galownia, clamping down and refusing to let loose, until Mary Granville, who was present, intervened. Lauren averaged three aggressive acts per day. Lauren's behaviors were disruptive and deleterious to the educational process of the other students.

Faced with the numerous and frequent aggressive and disruptive behaviors, Parkway and the SSD looked to determine whether Lauren's continued placement at

Parkway Central Middle School was appropriate for her. Lauren's IEP was revised. A reevaluation of Lauren was commenced. In March, 1994, the IEP team, which included Lauren's parents and their attorney, met yet again. The IEP/placement process prescribed by the IDEA was not completed after a full-day meeting. A second meeting would be necessary. However, during the March meeting, it was proposed by the districts that Lauren be removed from the regular education art class. The Lights disagreed and requested an administrative hearing, as contemplated by the IDEA, thereby invoking the "stay-put" provision found in 20 U.S.C. § 1415(e).

The IEP team reconvened on April 6, 1994. At that time, the SSD and Parkway proposed a change in educational placement. The parents disagreed with the proposed change of placement and again exercised their rights under the IDEA. Significantly, the witnesses to whom Petitioners refer in Part III of their Argument were present during this IEP team meeting. Petitioners were well aware of their identity at the time of the hearing before the district court. Petitioners had the power of subpoena available to them during the hearing before the district court. Petitioners shows not to subpoena the witnesses.

Six days later, on April 12, 1994, while Lauren was in art class, she grabbed the hand of another student with disabilities and struck the student at least three times. Following Lauren's overtly aggressive act, Parkway imposed a ten-day suspension. Before imposing the ten-day suspension, Parkway, through an assistant principal with extensive special education background herself, informed Lauren of the fact that the district was intending to suspend her. Lauren indicated that she was aware that she had struck the other student. Also present at the meeting were Lauren's teacher and the teacher's

immediate supervisor — a former professor of special education at the University of Missouri - St. Louis. Both testified that Lauren reacted in such a way that she knew that she was in trouble.

Mrs. Light had been invited, by telephone, to the office prior to the principal's meeting with Lauren. However, she declined. Later, the assistant principal informed Mrs. Light of the conduct in which Lauren had engaged. That evening, Parkway provided the parents with a written notice of the suspension and extended an invitation to the parents to discuss the matter more fully.

Instead, the parents chose to file an action in federal court, seeking both a declaratory judgment that Lauren had not been accorded adequate due process before the suspension was imposed, and injunctive relief, requiring the districts to allow Lauren to return to school. The districts filed a counterclaim, asking the district court, pursuant to **Honig v. Doe**, to allow the districts to change Lauren's educational placement during the pendency of the special education due process procedures.

After less than a day of testimony, the district court, in a ruling from the bench, ordered the districts to allow Lauren to return to Parkway Central Middle School. However, after two additional days of testimony, the district court vacated its previous order, and granted the districts' motion for injunctive relief, allowing the districts to change Lauren's educational placement. In so doing, the district court found that "maintaining Lauren in her current placement is substantially likely to result in injury either to herself or to others." **Light v. Parkway C-2 School Dist.**, 41 F.3d at 1226 (quoting the Order entered by the district court at App. 1).

The parents appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit agreed that maintaining Lauren in her current placement was substantially likely to result in injury either to herself or to others. **Id.** at 1230. On appeal, the parents had argued that in order for a court to order a change in placement under **Honig v. Doe**, the court must first find that the student is a truly dangerous child. To do so, the parents argued, the court would have to find that the student was capable of intending and in fact did intend to cause injury. Moreover, the injury involved, the parents argued, must be one involving the intentional infliction of serious harm. The Eighth Circuit rejected the parents' argument. The Eighth Circuit reaffirmed this Court's ruling in **Honig v. Doe:** that a school district seeking to change the educational placement of a student by invoking the equitable powers of the court must show that maintaining that student in the current placement is substantially likely to result in injury, either to the student or to others.

In a natural application of equity principles, the Eighth Circuit also announced that a school district, in seeking injunctive relief as anticipated by **Honig v. Doe**, must demonstrate that it took reasonable steps to minimize the risk of causing injury. Although the district court had not issued a ruling on this second prong, the Eighth Circuit, upon a review of the record, concluded that Parkway and the SSD had made reasonable efforts to minimize the risk that Lauren would inflict injury. **Light v. Parkway C-2 School Dist.**, 41 F.3d at 1230.

This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. As Petitioners, themselves, state: "Until now, no circuit court has interpreted the standard found in this Court's decision in **Honig v. Doe**,

484 U.S. 305 (1988)." Petitioners' Petition for Writ of Certiorari at 11.

Similarly, this case does not present a situation in which a United States court of appeals has decided a federal question in a way that is in conflict with a state court of last resort.

Moreover, this case does not present a situation in which a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

For the reasons advanced below, Respondents submit that this Court should deny the Petition for Writ of Certiorari.

Argument

I

Whether the United States Court of Appeals for the Eighth Circuit correctly applied the standard announced by this Court in Honig v. Doe, 484 U.S. 305 (1988), in finding that a student who, at various times, has hit, kicked, and slapped other students, thrown pencils and other objects at other students' eyes, ears, and faces, and attempted to overturn desks and tables, is a student who is substantially likely to cause injury either to herself or to others.

This case involves the application of the decision of the United States Supreme Court in **Honig v. Doe**, 484 U.S. 305 (1988), to a situation involving Lauren Light, a student with disabilities, as that term is used in the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-85. In interpreting **Honig v. Doe** and applying it the facts of this case, the Eighth Circuit held:

> [A] school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. Where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities, the district court may issue an injunction ordering that the child's placement be changed pending the outcome of the administrative review process.

Light v. Parkway C-2 School Dist., 41 F.3d 1223, 1228 (8th Cir. 1994).

The Individuals with Disabilities Education Act, guarantees all students with disabilities in participating states "the right of free appropriate public education." 20 U.S.C. § 1412(1). The term "free appropriate public education" means:

> special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under § 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

With this definition, the Act defines a free appropriate public education (FAPE) in broad, general terms, without dictating substantive educational policy or mandating specific educational methods. This imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided -- with state and local school officials." **Daniel R.R. v. State Board of Education**, 874 F.2d 1036, 1044 (5th Cir. 1989)(citing **Bd. of Educ. v. Rowley**, 458 U.S. 161, 207 (1982)). Second, Congress sought to bring children with disabilities into the mainstream of the public school system. **Mark A. v. Grant Wood Area Education Agency**, 795 F.2d 52, 54 (8th Cir. 1986); **Rowley**, 458 U.S. at 189.

In harmony with the foregoing, the IDEA assures that "to the maximum extent appropriate," children with disabilities will be educated with nonhandicapped children, 20 U.S.C. § 1412(5)(B), and mandates that "special classes in separate schools" are appropriate only when the "nature or severity of the disability is such that education in regular classes with use of supplementary aids and services can not be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).

Section 20 U.S.C. § 1412(5)(B) indicates a strong congressional preference for mainstreaming. **Daniel R. R.**, 874 F.2d at 1045; **Lachman v. Illinois State Board of Education**, 852 F.2d 290, 295 (7th Cir. 1988); **A. W. v. Northwest R-I School District**, 813 F.2d 158, 162 (8th Cir. 1987); **Roncker v. Walter**, 700 F.2d 1058, 1063 (6th Cir. 1983). This provision is also referred to as the requirement of "least restrictive environment." 34 C.F.R. §§ 300.550-.556 (1986); **A. W.**, 813 F.2d at 162.

Insofar as a state is required to provide a child with disabilities a FAPE, the Supreme Court has found that a school district satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act.

The IDEA requires participating states to educate children with disabilities with nondisabled children whenever possible. Before a school district may place a student in a more restrictive environment, it must

demonstrate that the nature or severity of the disability is such that education in the less restrictive environment with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(B). The school district must also make efforts to modify the regular education program to accommodate the disabled child. **Oberti v. The Board of Education**, 995 F.2d 1204 (3rd Cir. 1993).

"Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." **Honig v. Doe**, 484 U.S. at 311. Whenever the parents or guardian of a student with disabilities disagrees with the evaluation, educational plan, or placement of the student, or disagrees that the student is receiving a FAPE, those parents or guardian has the right to seek review of those aspects of the student's education which the parents or guardian believes are inappropriate. **Id.** at 312; 20 U.S.C. § 1415. Among the rights available to the parent or guardian is the right to an "impartial due process hearing." 20 U.S.C. § 1415(b)(1), (2). If the parent or guardian disagrees with the decision at the administrative level, the parent or guardian has the right to file an action in either state or federal court. 20 U.S.C. § 1415(c), (e)(2).

> During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .

20 U.S.C. § 1415(e)(3). This provision is known as the "stay-put" provision.

What happens if allowing a student to remain in the then current educational placement would pose a significant risk of injury, either to the student or to others? In **Honig**, this Court found that there is no "dangerousness" exception to the stay-put provision. **Honig v. Doe**, 484 U.S. at 323. However the Court went on to state:

> As the [IDEA]'s legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents objection pending completion of the review proceedings."

Honig v. Doe, 484 U.S. at 327 (quoting **Burlington School Committee v. Massachusetts Dept. of Education**, 471 U.S. 359, 373)(emphasis by the **Honig** court).

Therefore, where a school district is faced with a situation in which maintaining a student in that student's current educational placement would pose a significant risk of injury either to the student or to others, and the school district is unable to otherwise agree with the parent with respect to an interim placement, then that school district may seek injunctive relief under § 1415(e)(2). That is precisely what Parkway and the SSD did in this case.

When seeking injunctive relief, a school district must overcome the presumption noted above in favor of the then current educational placement. **Honig v. Doe**, 484 U.S. at 328. To do so, a school district must show that maintaining the student in his or her then current educational placement is "substantially likely to result in injury either to himself or herself, or to others." **Id.**

Petitioners ask this Court to hold that a school district must demonstrate that the student is "truly dangerous," in addition to substantially likely to cause injury. The Eighth Circuit appropriately dismissed this argument as tautological. Such a requirement would render this Court's decision in **Honig** superfluous.

In addition, Petitioners would have this Court find that a child cannot be truly dangerous if the child were incapable of forming the intent to injure. The Eighth Circuit, quite understandably, gave this argument short shrift.

The Eighth Circuit did announce what it purported to be an "essential second test" which must be met by a school district. That is, the "school district must show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure herself or others." **Parkway v. Light**, 41 F.3d at 1228.

The essential second test is a logical application of well founded principles of equity. It is tantamount to an "educational clean hands" doctrine.

Thus, in reaching its decision, the Eighth Circuit appropriately applied the standard set by this Court in **Honig v. Doe**. Accordingly, this Court should not grant Petitioners' Petition for Writ of Certiorari.

II

Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in Honig v. Doe, 484 U.S. 305 (1988), in applying the standard announced in Honig in a carefully reasoned opinion.

Petitioners propose an eight-part test for determining whether or not an action is dangerous. Petitioners miss the point. This Court announced that the measure for whether or not a school district is entitled to injunctive relief is whether maintaining the student in his or her then current educational placement is likely to result in injury, either to the student or to others.

Apparently, Petitioners believe that because police were not called and because no one lost life or limb, there was no injury, simply nuisance. It does not matter to Petitioners that Lauren would bite her teacher on a daily basis. It does not matter to Petitioners that Lauren would kick her classmates. It does not matter to Petitioners that Lauren struck a classmate in the art room time after time after time.

As used in the **Honig** test, "injury" need not be a physical injury that would require medical attention. The Eighth Circuit is absolutely correct in rejecting the contention of Petitioners that "an 'injury' is inflicted only when blood is drawn or the emergency room visited." **Light v. Parkway C-2 School District**, 41 F.3d at 1230.

Indeed, as the Eighth Circuit points out, what a school district must show is the ***likelihood*** of injury, not that serious harm has already been inflicted. Moreover, the Respondents suggest that psychological injury, emotional

injury, and educational injury are equally damaging to a young student.

The Eighth Circuit's decision is thoughtful and carefully measured. It correctly interprets and applies **Honig v. Doe**. It does not expand into new areas. Rather, it draws upon time honored equitable doctrine and a decision of this Court. Accordingly, this Court should not grant Petitioners' Petition for Writ of Certiorari.

III

Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

The standard to apply in reviewing a district court's refusal to reopen a case is abuse of discretion. **Johnson v. Busby,** 953 F.2d 349, 351 (8th Cir. 1991); **Harris v. Ark. Dept. of Human Services,** 771 F.2d 414, 416 (8th Cir. 1985) (lower court will not be reversed in absence of a "clear showing of abuse of discretion"). Under Federal Rule of Civil Procedure 59, the district court has broad discretion in deciding whether to reopen a case. In making this decision, the court should take into account "the character of the additional testimony and the effect of granting the motion. . . . The court should also consider the diligence of the moving party, and any possible prejudice to the other party." **SEC v. Rogers,** 790 F.2d 1450, 1460 (9th Cir. 1986). In the instant case, the district court did not abuse its discretion in refusing to reopen the hearing.

As a threshold matter, Petitioners never formally moved to reopen the hearing. After resting their case on April 21, 1994, Petitioners merely wrote to Judge Gunn on April 22, 1994, asking to have the hearing reopened, knowing full well that the court intended to enter judgment on that same date. Informal correspondence, such as that presented by Petitioners is not sufficient to serve as a formal motion. **See Cochran v. Celotex Corp.**, 125 F.R.D. 472, 473-74 (C.D. Ill. 1989) ("it is improper to communicate with any court by means of correspondence -- the appropriate method of communicating with a court is by means of a motion"). Moreover, the letter was not sent to the clerk of the court, but to Judge Gunn's chambers, so presumably, Petitioners did not intend for it to become part of the record. It is clear that the letter was simply intended to circumvent well-established rules and to gain an advantage when it appeared the court would rule in the districts' favor.

Moreover, there was nothing of substance in the letter to Judge Gunn to support the allegations of "extraordinary new evidence." The basis for the request was founded on hearsay, the reporter of which was Mrs. Light.

In addition, the court's refusal to reopen the hearing was not an abuse of discretion because Petitioners did not act with diligence in securing their witnesses. Petitioners letter fails to explain why they could not have spoken to and obtained these "new" witnesses at an earlier date. Each of the witnesses mentioned in the letter was present at both the March 23 and April 6 IEP meetings and each had the opportunity to state her views. In fact, Petitioners asked questions of each of these individuals during the two IEP meetings. Although the hearing moved quickly, it is clear that Petitioners did not act with diligence in securing and subpoenaing witnesses they knew were available to testify.

Refusing to reopen the case did not leave the Petitioners hamstrung. The ultimate placement issue, at the time of the district court's order, was still to be decided under the IDEA's administrative procedures.

In summary, it is clear that the district court did not abuse its discretion in refusing to reopen the hearing. The additional testimony was irrelevant and Petitioners were simply not diligent in securing their witnesses. Finally, the districts would clearly have been prejudiced by any further delay in receiving the requested injunctive relief because each additional day that Lauren remained at the Middle School presented an opportunity for a student or staff member to be harmed.

Conclusion

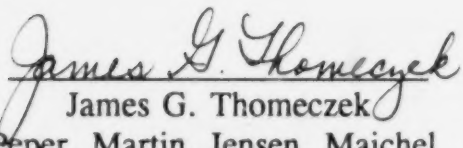
This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. Nor is this case one in which a United States court of appeals has decided a federal question in a way that is in conflict with a state court of last resort. Moreover, this is not one in which a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

This case simply presents a situation in which the United States Court of Appeals for the Eighth Circuit examined, explained, and applied this Court's decision in **Honig v. Doe**. The Eighth Circuit reaffirmed this Court's opinion that there may be times when a school district will have to invoke the equitable jurisdiction of the courts to change the educational placement of a student with

disabilities, whose continued presence in the current placement presents a substantial likelihood of injury.

Because such is an appropriate exercise of the court's equitable powers, and because the court, in this case, wisely and carefully exercised its discretion in changing Lauren's placement , Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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